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The Governor's Executive Power

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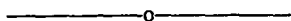
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The Democrats and Republicans have been having big meetings during the last few weeks. A number of noted speakers have been out to address the respective clubs. General J. Tandy Ellis and Hon. Pres. Kimball were the speakers at the last meeting of the Democratic club. A large crowd of young voters were present and greatly appreciated the remarks of the speakers.

The college of law opened this year with an enrollment of one hundred and twenty-eight students. Dean Lafferty is much pleased with the freshman class. There is not a special student in the class.

The Bobs Merrill Company, publishers, of Indianapolis, have presented the students of the law department with Eliots' *The Work of the Advocate*, to be competed for in a contest to be conducted by the Law Journal. This gift from the Bobs Merrill Company is much appreciated by the students and the contest promises to be a warm one.

The W. H. Anderson Company, of Louisville, have moved from 209 Walker Building to larger and more commodious quarters at 238 Fifth Street. A representative of the company called at the department a few days ago and placed Cochran's *Law Lexicon* on sale with Mr. Back, the student book dealer.



THE GOVERNOR'S EXECUTIVE POWER

Dr. Goodnow, President of Johns-Hopkins University, in his authoritative work, *"The Principles of the Administrative Law of the United States,"* speaks of the American conception of the executive power in the latter part of the eighteenth century (which would be the period of 1775 to 1800) as exemplified in the early state government, in these sentences: "The American conception of the executive power prevailing at the time of the adoption of the United States' Constitution corresponded with that part of the executive power which has been called political. * * * The care of the

foreign relations was not in the Governor's hands, simply because during the colonial period the mother country, and during the existence of the states as sovereign states, the Continental Congress attended to the matter. To a similar reason is due the fact that the State Governor did not have very extensive administrative powers. Administrative matters outside of those directly connected with the military powers of the Governor had not been attended to by the central (state) government, but in accordance with English principles of local government, by various officers in the local districts of the state who were regarded as local in character and who often at the same time discharged judicial functions. These officers were to act in accordance with laws which descended into the most minute details. Thus, executive instructions and orders were unnecessary. * * * The facts were the same in the branch of administration known as internal affairs. * * * There was then left only one branch of administration in which the central colonial government had any important powers to exercise; this was the administration of the central finances. * * * The legislature claimed and obtained the power to vote all supplies that the government could obtain, to specify in the appropriation acts for what purposes and in what amounts the money it had raised should be expended, and to designate the officer who was to have charge of its collection and disbursement. Further, the localities attended to a great many matters which were of interest to the state as a whole, and paid the expenses which attention to these matters necessitated, so that even the financial administration of the central government was not, on the whole, important. * * * The power of appointment, which has often been regarded as distinctly an executive power, was treated differently in different states, but the conception that it belonged to the Governor in the case of other than judicial and local officers was not very clear, * * * One fact further deserves mention; that is, the Governor possessed neither in the colonial nor in the original state government any general ordinance power even to supplement existing law."

A careful reading of these extracts will indicate that the conception of executive power in the light of which we must read the

lines and between the lines of the early state constitutions, was only partial as compared with the conception of sovereign executive power inherent in an independent state. So that, when we consider the words of the Kentucky Constitution, section 69: "The supreme executive power of the Commonwealth shall be vested in a chief magistrate, who shall be styled the 'Governor of the Commonwealth of Kentucky,' " we must understand the words "the supreme executive power" to impart only that conception of executive power which was entertained at the time they were written. What is the extension of that power can only be determined at present, with reference to a particular application. Perhaps it can only be measured and defined by an enlightened and progressive public opinion. The courts, in the few instances in which the words "executive power" have been before them for construction, have generally held that they have very little meaning. In an early case, the Supreme Court of Vermont said: "There are no powers incident to the executive character of a chief magistrate of this state (Vermont), unless they are obviously necessary to carry into effect some of the powers expressly given." This was an early decision, and, of course, its import is to be found in the words "incident to." The court was speaking of the power, if any, inherent in the office of Governor. It was admitted that the Governor had such powers as "are obviously necessary to carry into effect some of the powers expressly given."

Professor Goodnow says: "The constitutions of most of the states of the American union, like the Constitution of the United States, vest the executive power in a chief executive. The meaning of the words 'executive power' in this connection is the same as is that of the same words used in the Constitution of the United States with reference to the President. That is, little if any power is to be regarded as vested in the Governor as a result of the grant to him of the executive power. In order to find out exactly what is the position of the Governor in the system of government adopted in any one of the states of the American Union, we have to look through the Constitution of that state for the powers which are specifically and expressly granted to him. * * * For the state courts have not derived, as has the Supreme Court of the United States, any very

large powers from such a general power or duty as to see that the laws be faithfully executed. In other words, the principle of narrow construction is more commonly adopted with regard to the powers of the Governor than with regard to those of the President." If it were not a fact, it would be inconceivable that the doctrine of strict construction, whose only justification and application were in defense of the states against the imaginary encroachment of the federal jurisdiction, should apply to the authority of an officer of the state. This false use has clogged the whole system. No doubt, the explanation is that it was never so conceived, but was overlooked. The public mind was directed solely at the relation of the federal power to the state power, and political leadership was not developed in respect of the internal affairs of the state. Surely the time has come when we can grasp the enormity of this error. Questions of federal and state relations have been settled; our domestic concerns are calling more loudly for wise leadership than did ever that relationship.

In Beard's "American Government and Politics," it is said: "The state constitution generally vests the 'executive power' in the Governor and charges him to take care that the laws are faithfully executed. In the enforcement of the law, the Governor has to deal with private persons and with the public officials. In the former instance he acts directly in important matters, by ordering the state's attorney to proceed in the proper court against offenders; or, when there is a riot or other disorder too serious for the regular processes of the courts, he may declare martial law in the region affected and employ the militia of the state." In other words, it is the view of Professor Beard that the grant of "executive power" confers upon the Governor the power to act in vindication of the law and authority of the Commonwealth either by resort to the procedure, judgment and execution of the court, through the attorney general or by resort to force when that is required. He says further: "In no branch of the state government have we departed further from the example set by the first State Constitutions than in the executive department. This has been due in part to social and economic changes which have multiplied administrative offices, and in part to a

growing distrust of the legislature and an increasing confidence in the Governor. In their contest against British dominion, the colonists had used their legislatures with great effect against the provincial governors, and it was only natural that, after securing independence, they should have regarded the executive with great jealousy, and looked rather to the legislature as the safeguard of their liberties. At the outset, therefore, the Governor was a mere nonentity, or at best a servant of the legislature; but from this position of political insignificance, the office has been gradually raised by the addition of new powers and duties, until today, the Governor of the state possesses a constitutional and administrative authority of no mean proportions; and when he becomes, as he may, the representative of great popular interests, he not only overshadows the legislature, but sometimes springs into prominence as a national figure."

Upon the same line, and carrying the general conclusion to still further lengths, extracts from "The New American Government and its Work," by Mr. James T. Young, Professor of Public Administration, Wharton School of Finance and Commerce, University of Pennsylvania, are most entertaining and enlightening. The most modern of the modernists could not ask anything more practical and breezy. Mr. Young is stimulating to the point of intoxication. He says: "The state executive is slowly struggling upward into the same position of leadership that has already been won by the President. For many generations the Governor was a mere figurehead, because in colonial days he had been the 'royal executive' and, as such, the means of royal oppression and tyranny. When the colonies became states in the Revolution, they immediately stripped the office of its real authority and left it that curious anomaly which it has since remained until the most recent years, a post of much honor but little power."

"The Governor's personality influences his legislative control; if he is a natural leader and has a hold on the people he may draw up a strong program of popular measures and, concentrating public attention upon these by an open and aggressive campaign of speech-making and public interviews, he may bring such pressure to bear on the legislature as to force his program through. Many successful

Governors have done this, among them, Cleveland, Roosevelt, Hughes, Lafollette, Johnson, Cummins, Wilson, and others. Instead of submitting to the advice and commands from 'higher up,' they have gone direct to the people and have won. It is precisely this appeal to the voters that determines the strength of the Governor, and brings the office to the plane of real influence.

Mr. Young quotes Finley and Sanderson's work, "The American Executive," as follows: "While all these *ex parte* answers (to letters of enquiry sent to Governors as to their influence in securing legislation) indicate with one or two exceptions a disposition on the part of legislatures to follow executive suggestion, it is apparent even from these letters that it is not a servile following, and it is plainly stated or intimated by two or three that they both follow an imperative public opinion, the Governor having the first opportunity to respond, and so giving unintentionally the impression of leading, whereas, he, too, but follows. It is apparent, too, that the Chief Executive has found a way of compelling legislation, while punctiliously observing the legislative limitations of his office; that is, by appealing to public opinion to make itself felt in the legislature. There is certainly no menace in the power of the Chief Executive of the Commonwealth. He has too little. Greater centralization of administrative power and unity of effort are here desirable."

Mr. Young says: "As Chief Executive of the State, the Governor is required 'to see that the laws are faithfully administered.' He receives complaints from citizens, supervises the work of the heads of department, represents the State in the relations with the other Commonwealths and with the National Government. As a rule, however, he is unable to watch the various departments as closely as he should, because of the loose and unsystematic way in which the offices are grouped, and, unless an official is guilty of serious maladministration or dishonesty, he is not apt to attract the unfavorable notice of the chief. * * * Although a Governor may not compel an elected official to perform his duties, nor force any fixed policy upon the great mass of boards and offices which make up the chaos of State administration, he does possess one power which is often used effectively to enforce the general regulative laws

of the State, viz.: his control over the general attorneyship. That official is usually in closest personal and political association with the Governor and controls the prosecuting machinery of the central state government. In important conflicts between the State and the organized interests opposing regulation, his office can be used to enforce the laws in such a way as to command respect for the State administration. No corporation today enters such a conflict except as a last resort. In this way the chief law officer of the State has become a tower of strength to the executive.

"In theory the Governor oversees all officials, but in practice this is impossible. Modern governments are much like machinery; there is in each the same tendency to needless friction, the same necessity for accurate adjustment of the wearing parts, and even the same inert inclination to 'run down' unless constantly impelled by that expansive force which in physics is called steam, in politics public opinion. But this force, to be effective, must be concentrated. It cannot be trivially or indiscriminately 'squirted' at any or all parts of the governmental machine, causing them to work in unison; it must be guided and led along direct straight lines. This is the rightful function of the Chief Executive, he should represent the guiding force of public opinion, he must personify the people in their political feelings. * * * We are too prone to say that all depends on the personality of the chief, that if he is an energetic, capable and honest man, his spirit will in some measure dominate the whole administrative force, while if he is incapable, no amount of 'system' will produce results. Such a statement is only half true, for a 'system' is the means through which the influence of the chief makes itself steadily and regularly felt.

"If the Governor ruled his party he would be the strongest influence in the State, for the control of the party and of the government are inseparable; no one can be the real head of the latter unless he is also the party leader. Glancing over the principal states we find that only in the rarest exceptions does the Governor occupy this position; almost invariably he is under the thumb of a great party chieftain who is 'the power behind the throne,' and who either prefers to occupy a seat in the United States Senate or not to hold

office at all. This man is the State administration. * * * Naturally he prefers to place in the Governor's chair a person who will be agreeable to his wishes, who will consider the party interests and, especially, who will help to build up the leader's influence within the party. It is clear that a Governor who is young, ambitious and determined to seek power for himself is not desired by 'the chief,' who much prefers a man advanced in years, or of satisfied ambitions, and amiable qualities—in short, a man of the 'honored citizen' type. Such was for many years the political position and influence of the State Executive—a nominal authority controlled by a 'kingmaker,' who was the real head of the State.

"Into this peculiar political situation a new factor has entered in the shape of the demand for greater State activity. * * * The Governor springs into greater prominence after every legislative attempt at regulation; with the adoption of factory, health, pure food, corporation laws, and a host of other measures his nominal power increases, until a point is reached where he can no longer withstand the temptation to assert some slight degree of independence and feel himself indeed, as in name, the Chief Executive. If he is a strong man or a consummate politician, or if the conditions of the moment prove especially favorable, he subordinates the State executive offices, one after the other to his own control, and even reaches out towards the legislature to form a mutual understanding or alliance with the party leaders, to become the real head of his party. * * * This is the significance of the constant turmoil and political unrest in our Commonwealth administration; we are evolving a responsible form of State government."

It is apparent from these practical views, just from the press, that the changed conditions, economic and social, of the present period call for and are getting in the State Governor something far more active and efficient than the ancient and eloquent, benevolent and esteemed, conventional and innocuous "honored citizen." The matter was clearly stated with reference to the President some years ago by the Attorney General of the United States. He said that the President "is limited in the exercise of his powers by the Constitution and the laws, but it does not follow that he must show

a statutory provision for everything he does. The government could not be administered upon such contracted principles. The great outlines of the movements of the executive may be marked out and limitations imposed upon the exercise of his powers. Yet there are numberless things which must be done which cannot be anticipated and defined, and are essential to useful and healthy action of government." The executive office is now, of necessity, a potential power house and not a vault for entombing worn out theories. The occupant is charged and empowered to take notice and to initiate.

The growth of the English Constitution from Magna Charta to the Declaration of Independence was in the evolution of the principle that the administration should be an arm through which the will of the people might act, but which should have no power of oppressive action of itself. That is, the struggle was, not against the administrative action of the executive, but against the absolute and arbitrary power which he might assume under the guise of his prerogative. To that end two expedients were devised: (1) Much of the function of administration was withdrawn from his control and reposed in local officers. (2) His prerogative was reduced so that in performing the function of administration he was required to act indirectly, through other officers not immediately dependent upon his appointment. For instance, the executive secured faithful execution of the law through a civil action, or, in criminal cases, through a prosecution in the courts; or through performance of the act required and the collection of the costs through an action at law; or through summary but orderly and prescribed proceedings in revenue matters; or, infrequently, by the application of physical force in the sanitary administration, in the destruction of dangerous property, and in the abatement of nuisances. These and other instances will show that the executive's exercise of power was subjected during that period to a curtailment in application, and to the limitation upon his prerogative, that in many instances he must first obtain the process of a court or other tribunal. In other words, if the executive sought to proceed in the execution of the laws as far as depriving a citizen of life, liberty, or property, he must proceed in accordance with the due process required by the common law or the statutes.

Beyond this, there seems to have been very slight, if any, restraint imposed upon the executive except in those instances in which the power of direct administrative action was reposed in local officers, such as sheriffs, constables, justices of the peace, and specially designated boards and commissions. Thus it appears that in 1776, the ideal of the executive was an officer without any prerogative inherent in his person, without power to act directly in many particular instances of administrative activity, without power to deprive any person of life, liberty, or property unless through a due process prescribed by the legislature or the common law, but with full power to initiate and prosecute any proceeding required for the execution of the laws, whether by influence brought to bear upon the officer or private citizen, or through the judgment and process of a court or other tribunal. The difficulty is not in the conception nor in its statement, but in its instances and modes of application.

In the constitutional system of Kentucky, all these provisions and limitations have been expressly established and confirmed: (1) The executive has no prerogative inherent in his person. (2) Many direct administrative acts are reposed in local officers, boards and commissions. (3) The state may not, in the execution of the laws, deprive any person of life, liberty, or property without due process of law. (4) Subject to these, the executive is charged and authorized to use all means necessary and proper in his discretion to exercise care that the laws are faithfully executed, and the military arm of the state has been made subject to his order to sustain him if it should be necessary.

It will follow as a necessary consequence that whenever the honor, and the peace and dignity of the Commonwealth, and, also, the political rights and peace, safety, happiness, lives, liberties, and property of the citizens to which they are entitled under the laws are openly and contumaciously violated by either officers or citizens, but in such cases there is no remedy provided by express enactment or the common law through prescribed procedure which may be invoked by the people as of right, then, in such cases, the only remedy lies through the exercise of the supreme executive power of the Commonwealth which has been reposed in the Governor.

In consideration of all which the following propositions would seem to be self evident:

(1.) That the sovereignty, although not the entire sovereign power of the Commonwealth, is lodged in the chief magistrate.

(2.) That provision and care for the peace, safety, happiness, the protection of property and the general welfare of the people in respect of these within the limits of the function of government are entrusted by the people to the watchful prevision and jealous concern of the sovereignty of the state.

(3.) That in order that such watchful prevision, and jealous concern may be faithfully exercised for the security of the people against the absolute and arbitrary use of power by those in whom it has been reposed, the people have ordained and expressly authorized and enjoined upon the chief magistrate that he "shall take care that the laws are faithfully executed."

(4.) That the people are in the enjoyment of many rights and are entitled to the observance of many reciprocal duties which have not been reduced to exact definition, and of which the enforcement and redress are not regulated and have not been prescribed through any formulated action or due procedure of law.

(5.) That power has been conferred upon the Governor and his office has been instituted to the end that he may perform all the acts necessary and proper for the application and faithful execution of the laws, which acts are not specifically provided for and entrusted to other offices; and that he may act at his discretion in all matters necessary and proper to be done in order to secure to the people the full enjoyment of all the rights and reciprocal duties entrusted to the care and protection of government of which they are possessed, which are not reduced to definition and a prescribed form of procedure, and which are not entrusted to the care of any other specified office or magistracy by express law or custom.

(6.) That decent and orderly access to the sovereignty of the Commonwealth is of right, and necessary and proper in order that a free and outspoken people may obtain relief from the righteous sense of oppression and grievance.

(7.) That in the performance, and necessary and proper to

the exercise of the political function so conferred upon the Governor, the following and many other powers, rights and reciprocal duties are entrusted to his jealous care and watchfulness

He has the power to institute enquiry as to the faithful execution of the laws in order that he may take care.

He has the power to hear complaints and to receive addresses and petitions and remonstrances.

He has the power to assemble the people of municipalities for conference and enquiry

He has the power of visitation to the peoples of municipalities for enquiry and conference.

He is the spokesman of the Commonwealth and the expounder of the rights of the people and of humanity

He has the power to make communications and give information and warning to the people and to officers.

His power to take action is commensurate with his power to make enquiry

Through him the sovereignty of the Commonwealth is made accessible to the people.

He is to take care to hear patiently and with benevolent concern all just grievances of the people.

He is to take care that the opportunity to approach the sovereignty in an orderly and decent manner is not made difficult to the end that the Commonwealth may escape reproach. In a republic, decent, orderly and respectful access to the sovereignty is matter of right and not of grace.

His power to confer and advise with the people extends to occasions of political and social upheaval as well as occasions of strife and violence.

He is to take all care to reduce and remove discord, disaffection and commotion among the people, and to prevent revolution.

While the general conception of the American Governor's function is that it is purely political and static, not executive, and while contumely has been visited upon the American Governor in that regard and it has been assumed that he is negligible as having no power in execution, yet the Constitution of Kentucky provides ex-

pressly in section 69: "The supreme executive power of the Commonwealth shall be vested in a chief magistrate who shall be styled 'The Governor of the Commonwealth of Kentucky.' "

Under the grant of supreme executive power the Governor of Kentucky has supreme power to act in taking care that the laws be faithfully executed in so far as the power to act in a defined case has not been conferred specifically upon some other office.

He has the power to cause the sovereignty of the Commonwealth, either in his person or in that of another by his commission and direction, to appear before all tribunals and constituted authorities, in virtue of the prerogative of sovereignty, there to make motions and institute proceedings which may be necessary and proper to vindicate the honor and dignity and power of the Commonwealth and to restore to the people the full enjoyment of rights and duties of which they have been deprived.

In his own person, or through the Attorney General at his direction, he may cause the sovereignty to appear by right of prerogative before the mayor and commissioners of the municipalities of the state to make motions and institute proceedings which are indicated as appropriate and proper in the performance and execution of the duty to take care.

He has the power to refer petitions for redress of grievances to the special officers to whom the power of redress has been particularly entrusted by the Constitution or laws.

His power to act is supreme, and his acts are not subject to the review and control of the courts except in those matters which are excepted from his discretion and are reduced to definition and a prescribed form of due process.

His power to act extends to animadversion upon, criticism of, and warning to officers of administration in the state and in localities in respect of the faithful execution of the laws.

His responsibility of office calls for and requires that he seek and obtain reliable information as to just grievances and the state of public feeling in the Commonwealth and in localities through whatever means and channels his discretion may point out. These will naturally include private conference and newspapers, but above

all, and more reliable than all, a visitation to the people themselves in public assemblage, there to hear petitions, addresses and remonstrances decently and respectfully proffered.

Petitions, addresses and remonstrances proffered to him in the capacity of one invested with the power of government upon application for redress of grievances or other proper purposes, whether upon the assembling of the people together in a peaceable manner for their common good or upon other proper occasions are privileged.

(8.) That no orderly and due procedure has been prescribed, for instance, and no authority or magistracy has been indicated in the express laws of Kentucky by and through which the people of the city of Lexington are empowered, as a matter of right and not of grace, to apply for redress and institute and compel proceedings to effect the removal from office of the police judge.

(9.) That if the power of removal from office of the police judge is vested in the mayor and commissioners, nevertheless it is provided that the motion for removal may be made only upon the initiative of one or more of the commissioners. Whence the people may not move for the removal of the police judge and secure action by the commissioners as of right, but only as matter of grace, dependent upon the arbitrary will of the mayor and commissioners.

(10.) That the provision of the law which restrains the exercise by the mayor and commissioners of the jurisdiction to hear and adjudge a proceeding for the removal of the police judge to occasions when the action is initiated by one or more of the members of the body which is to hear and adjudge upon the motion, confers absolute and arbitrary power, excludes the people from the full and untrammelled enjoyment of their liberties under the Constitution and laws, and is in derogation of their right to have the benefit of this law faithfully administered in their behalf.

LYMAN CHALKLEY.